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DEPARTMENT OF COMMERCE

International Trade Administration

[A-201-820]

Fresh Tomatoes from Mexico: Notice of Initiation of Changed Circumstances Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce

SUMMARY: On January 22, 2008, the Department of Commerce (the Department) signed the current antidumping suspension agreement on fresh tomatoes with growers/exporters of Mexican tomatoes accounting for substantially all (*i.e.*, not less than 85 percent) of Mexico's tomato exports to the United States. The agreement covers all fresh or chilled tomatoes of Mexican origin, except tomatoes that are for processing. On June 22, 2012, the U.S. petitioners in the underlying suspended antidumping duty investigation (*i.e.*, the Florida Tomato Exchange, the Florida Tomato Growers Exchange, the Florida Fruit and Vegetable Association, the Florida Farm Bureau Federation, the Gadsen County Tomato Growers Association, Inc., the South Carolina Tomato Association, Inc., and the Ad Hoc Group of Florida, California, Georgia, Pennsylvania, South Carolina, Tennessee, and Virginia Tomato Growers (collectively, the petitioners)) filed a request for withdrawal of the petition and termination of the investigation and the suspension agreement.¹ For the reasons stated in this notice, the Department is initiating a changed circumstances review of the suspended investigation. Interested parties are invited to submit comments for the Department's consideration.

¹ Letters were filed from all of the petitioners listed in Exhibit 5 of the April 11, 1996, supplement to the petition, except for Landseidel Farms, Inc., Byrd Foods, Inc., and J&B Tomato, Inc. The petitioners' June 22, 2012, filing included statements from the Executive Vice President of the Florida Tomato Exchange explaining that multiple attempts had been made to contact these three companies and attesting that there is no indication that these companies are still producing tomatoes.

EFFECTIVE DATE: [Insert date of publication in the Federal Register.]

FOR FURTHER INFORMATION CONTACT: Judith Wey Rudman or Anne D’Alauro, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington DC 20230; telephone (202) 482-0192 or (202) 482-4830, respectively.

SUPPLEMENTAL INFORMATION

Background

On April 18, 1996, the Department initiated an antidumping investigation to determine whether imports of fresh tomatoes from Mexico are being, or are likely to be, sold in the United States at less than fair value (LTFV). See Initiation of Antidumping Duty Investigation: Fresh Tomatoes From Mexico, 61 FR 18377 (April 25, 1996). On May 16, 1996, the United States International Trade Commission (ITC) notified the Department of its affirmative preliminary injury determination. See Fresh Tomatoes From Mexico; Import Investigation, Investigation No. 731–TA–747 (Preliminary), 61 FR 28891 (June 6, 1996).

On October 10, 1996, the Department and Mexican tomato growers/exporters initialed a proposed agreement to suspend the antidumping investigation. On October 28, 1996, the Department preliminarily determined that imports of fresh tomatoes from Mexico were being sold at LTFV in the United States. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Tomatoes from Mexico, 61 FR 56608 (November 1, 1996) (Preliminary Determination). On the same day that the Preliminary Determination was signed, the Department and certain growers/exporters of fresh tomatoes from Mexico signed an agreement to suspend the investigation. See Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico, 61 FR 56618 (November 1, 1996) (1996

Suspension Agreement).

On May 31, 2002, Mexican tomato growers/exporters accounting for a significant percentage of all fresh tomatoes imported into the United States from Mexico provided written notice to the Department of their withdrawal from the 1996 Suspension Agreement, effective July 30, 2002. Because the 1996 Suspension Agreement would no longer cover substantially all imports of fresh tomatoes from Mexico, effective July 30, 2002, the Department terminated the 1996 Suspension Agreement, terminated the five-year sunset review of the suspended investigation, and resumed the antidumping investigation. See Notice of Termination of Suspension Agreement, Termination of Sunset Review, and Resumption of Antidumping Investigation: Fresh Tomatoes from Mexico, 67 FR 50858 (August 6, 2002).

On November 8, 2002, the Department and Mexican tomato growers/exporters initialed a proposed agreement suspending the resumed antidumping investigation on imports of fresh tomatoes from Mexico. On December 4, 2002, the Department and certain growers/exporters of fresh tomatoes from Mexico signed a new suspension agreement (2002 Suspension Agreement). See Suspension of Antidumping Investigation: Fresh Tomatoes From Mexico, 67 FR 77044 (December 16, 2002). On November 3, 2003, the Department published the Final Results of Analysis of Reference Prices and Clarifications and Corrections; Agreement Suspending the Antidumping Duty Investigation on Fresh Tomatoes From Mexico, 68 FR 62281 (November 3, 2003).

On November 26, 2007, Mexican tomato growers/exporters accounting for a significant percentage of all fresh tomatoes imported into the United States from Mexico provided written notice to the Department of their withdrawal from the 2002 Suspension Agreement, effective 90 days from the date of their withdrawal letter (i.e., February 24, 2008), or earlier, at the

Department's discretion.

On November 28, 2007, the Department and certain Mexican tomato growers/exporters initialed a new proposed agreement to suspend the antidumping investigation on imports of fresh tomatoes from Mexico. On December 3, 2007, the Department released the initialed agreement to interested parties and provided them an opportunity to comment on the initialed agreement. On December 17 and 18, 2007, several interested parties filed comments in support of the initialed agreement.

Because the 2002 Suspension Agreement would no longer cover substantially all imports of fresh tomatoes from Mexico, the Department published a notice of intent to terminate the 2002 Suspension Agreement, intent to terminate the five-year sunset review of the suspended investigation, and intent to resume the antidumping investigation. See Fresh Tomatoes from Mexico: Notice of Intent to Terminate Suspension Agreement, Intent to Terminate the Five-Year Sunset Review, and Intent to Resume Antidumping Investigation, 72 FR 70820 (December 13, 2007). On January 16, 2008, the Department published a notice of termination of the 2002 Suspension Agreement, termination of the five-year sunset review of the suspended investigation, and resumption of the antidumping investigation, effective January 18, 2008. See Fresh Tomatoes from Mexico: Notice of Termination of Suspension Agreement, Termination of Five-Year Sunset Review, and Resumption of Antidumping Investigation, 73 FR 2887 (January 16, 2008).

On January 22, 2008, the Department signed a new suspension agreement (2008 Suspension Agreement) with certain growers/exporters of fresh tomatoes from Mexico. See Suspension of Antidumping Investigation: Fresh Tomatoes from Mexico, 73 FR 4831 (January 28, 2008).

On June 22, 2012, the U.S. petitioners in the suspended antidumping investigation filed a request for withdrawal of the petition and termination of the investigation and the suspension agreement (see footnote 1 above). Subsequent to their initial submission, the petitioners filed additional information supporting their request on July 11 and 23, and August 6 and 10, 2012, and additional letters of support on July 2, 19, 24, 26, and 30, and August 14, 2012. To date, the petitioners have submitted on the record of the 2008 Suspension Agreement proceeding letters of support from other tomato growers in California, Maryland, Virginia, Georgia, South Carolina, New York, Pennsylvania, North Carolina, Florida, and Arizona. The petitioners have also filed letters of support on the same record from the Certified Greenhouse Farmers Association and the Coalition of Immokalee Workers, as well as letters of support from the Florida Department of Agriculture and Consumer Services, the Virginia Secretary of Agriculture and Forestry, the Texas Department of Agriculture, the Alabama Department of Agriculture and Industries, the Georgia Department of Agriculture, the North Carolina Department of Agriculture, and the California Department of Food and Agriculture.

The Mexican tomato grower/exporter signatories to the agreement oppose terminating the antidumping proceeding and the suspension agreement. The Mexican tomato grower/exporter signatories filed comments opposing the petitioners' request for terminating the proceeding and the suspension agreement on July 5, 17, and 30, and August 13, 2012, and letters of opposition from numerous parties on July 19, 25, 26, 27, 30, and 31, and August 1, 2, 3, 7, 8, 10, 13, and 14, 2012. To date, the Mexican tomato growers/exporters have filed letters on the record of the 2008 Suspension Agreement proceeding opposing withdrawal of the petition and termination of the agreement from the Fresh Produce Association of the Americas, based in Nogales, Arizona, numerous U.S. importers, several members of Congress, and several Mexican government

officials.

These filings are on the public record of the 2008 Suspension Agreement in Import Administration's Central Records Unit, room 7046 of the main Department of Commerce building. These filings are also available to registered users via Import Administration's Antidumping and Countervailing Duty Centralized Electronic Service System (IA ACCESS) at <http://iaaccess.trade.gov>.

Scope of the Suspended Investigation

The merchandise subject to the suspended investigation is all fresh or chilled tomatoes (fresh tomatoes) which have Mexico as their origin, except for those tomatoes which are for processing. For purposes of this suspended investigation, processing is defined to include preserving by any commercial process, such as canning, dehydrating, drying, or the addition of chemical substances, or converting the tomato product into juices, sauces, or purees. Fresh tomatoes that are imported for cutting up, not further processing (e.g., tomatoes used in the preparation of fresh salsa or salad bars), are covered by this Agreement.

Commercially grown tomatoes, both for the fresh market and for processing, are classified as *Lycopersicon esculentum*. Important commercial varieties of fresh tomatoes include common round, cherry, grape, plum, greenhouse, and pear tomatoes, all of which are covered by this investigation.

Tomatoes imported from Mexico covered by this Agreement are classified under the following subheadings of the Harmonized Tariff Schedules of the United States (HTSUS), according to the season of importation: 0702 and 9906.07.01 through 9906.07.09. Although the HTSUS numbers are provided for convenience and customs purposes, the written description of the scope of the suspended investigation is dispositive.

Initiation of Changed Circumstances Review

Based on the information contained in the petitioners' June 22, 2012, request, and following a review of the statute, our regulations and precedent, the Department has determined to conduct a changed circumstances review pursuant to section 751(b)(1)(B) of the Act. Although the petitioners request that the Department immediately terminate the suspended investigation without further comment or consideration based on their withdrawal of the petition, the Department has determined that a changed circumstances review is warranted. The Tariff Act of 1930, as amended (the Act), explicitly provides separate and distinct mechanisms for termination of an ongoing investigation (by withdrawal of the petition or indication of lack of interest) and a suspended investigation (through an administrative review or changed circumstances review). *Compare* section 734(a)(1)(A) of the Act with sections 751(d) and 782(h)(2) of the Act. The Department's regulations (both those currently in effect and those in effect in 1996)² mirror this distinction. *Compare* 19 CFR 351.222(g) and 19 CFR 353.25(d)(1)(1996) with 19 CFR 351.207(b) and 19 CFR 353.17(a)(1)(1996). Further, both the Act and the regulations (in effect currently and in 1996) contemplate treating termination of a suspended investigation like revocation of an order, and provide for termination of a suspended investigation through a changed circumstances review (or an annual administrative review) if substantially all of the domestic producers express a lack of interest in the suspended investigation. This distinction was made clearer in an amendment to the statute by the 1994 Uruguay Round Agreements Act (URAA), which added section 782(h) of the Act. This section, which clarifies that "no interest" revocations and terminations are permissible, also clearly

² Matters related to the conduct of the underlying investigation are governed by the regulations in effect in 1996. See *San Vicente Camalu SPR de RI v. United States*, 491 F. Supp. 2d 1186, 1203-04 (CIT 2007). The Department's current regulations are effective for segments of proceedings initiated after June 18, 1997. *Id.*; 19 CFR 351.701(2012). Accordingly, because this changed circumstances review is a new segment of the proceeding, it is governed by the regulations currently in effect.

distinguished between termination of investigations and termination of suspended investigations. This provision addresses the termination of suspended investigations and the revocation of orders together in paragraph (h)(2), while the termination of an investigation is addressed separately in paragraph (h)(1). See section 782(h) of the Act.

Although the petitioners cite three cases as support for their request to immediately terminate the suspended investigation (Axle and Brake Assemblies from Hungary,³ EPROMs from Japan,⁴ and Typewriters from Singapore⁵), the Department disagrees that this precedent governs the instant proceeding. Each of these cases is distinguishable from the present circumstances. Among other things, the agreements in the cited cases predate the URAA (effective January 1, 1995), and thus were not subject to the same statutory provisions that apply to the tomatoes suspension agreement, e.g., section 782(h) of the Act, which clarified that “no interest” revocations and terminations were permissible and clearly distinguishes between termination of an ongoing investigation and a suspended investigation. Further, in the cited cases, termination occurred with the agreement of or absence of objection from the signatories to the agreement in each of these cases. No such agreement or lack of objection from the Mexican signatories exists in this case. Further, notwithstanding the fact that the agreement in EPROMs from Japan predates the URAA, the termination in that case appears to fulfill the requirements of a changed circumstances review, even though the termination process was not labeled as such. In addition, the Department specifically stated in that case that a changed circumstances review pursuant to section 751(b) of the Act is “normally the mechanism for the termination of a

³ Truck Trailer Axle and Brake Assemblies from Hungary: Termination of Antidumping Duty Investigation, 61 Fed. Reg. 13481 (March 27, 1996) (Axel and Brake Assemblies from Hungary).

⁴ Erasable Programmable Read Only Memories From Japan: Termination of Suspended Antidumping Duty Investigation, 62 Fed. Reg. 28670 (May 27, 1997) (EPROMs from Japan).

⁵ Portable Electric Typewriters from Singapore, Termination of Suspended Antidumping Duty Investigation, 59 Fed. Reg. 22592 (May 2, 1994) (Typewriters from Singapore).

suspended investigation.” See EPROMs from Japan, 68 FR at 28671.

In light of the distinct statutory and regulatory provisions governing termination of an ongoing investigation and termination of a suspended investigation, and consistent with our statement in EPROMs from Japan, the Department has determined that a changed circumstances review is the expected mechanism by which the Department will examine a request to terminate a suspended investigation. Therefore, in accordance with section 751(b)(1) of the Act, we are initiating a changed circumstances review.

Both the Act and the Department’s current regulations require that “substantially all” domestic producers express a lack of interest in the order or suspension agreement in order for the Department to revoke an order or terminate a suspended investigation. See 782(h) of the Act and 19 CFR 351.222(g). The Department has interpreted “substantially all” to represent producers accounting for at least 85 percent of U.S. production of the domestic like product. Certain Orange Juice from Brazil: Preliminary Results of Antidumping Duty Changed Circumstances Review and Intent Not to Revoke, In Part, 73 FR 60241, 60242 (October 10, 2008), unchanged in Certain Orange Juice From Brazil: Final Results of Antidumping Duty Changed Circumstances Review, 74 FR 4733 (January 27, 2009). Interested parties are, therefore, requested to address the issue of industry support in their comments.

Public Comment

Interested parties are invited to comment on the initiation of this changed circumstances review and the issue of industry support. Parties who submit comments or information in this proceeding are requested to include with their submission (1) a statement of the issue; and (2) a brief summary of the comments or information. All written comments may be submitted by interested parties not later than 14 days after the date of publication of this notice, in accordance

with 19 CFR 351.303 of the Department's regulations, and shall be served on all interested parties on the Department's service list. As noted above, in the time since the petitioners requested to withdraw the petition and terminate the suspended investigation, there have been numerous comments on this request filed on the record of the 2008 Suspension Agreement. If interested parties would like those comments to be considered for purposes of this changed circumstances review, they are requested to file the comments on the record of this proceeding.

As soon as practicable following the receipt of any submissions from interested parties during the comment period, the Department will publish in the Federal Register a notice of preliminary results of changed circumstances review, in accordance with 19 CFR 351.221(c)(3), which will set forth the factual and legal conclusions upon which our preliminary results are based, and a description of any action proposed based on those results.

This notice is published in accordance with sections 751(b)(1) of the Act and 19 CFR 351.216 and 351.221(c)(3).

Paul Piquado
Assistant Secretary for
Import Administration

____ August 14, 2012 _____
Date

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